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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

YEN H. DANG,

Plaintiff and Appellant,

v.

THE BANK OF NEW YORK MELLON fka BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2005-8,

Defendant and Respondent.

A152197

(Alameda County
Super. Ct. No. RG15759938)

Appellant Yen Dang borrowed $448,000 in 2005, the loan secured by a deed of trust on her property. Dang stopped paying in 2010, and by 2017 the amount owed on her loan was $644,664. Apparently threatened with foreclosure proceedings, Dang filed a two-count complaint, alleging claims for quiet title and declaratory relief. The trial court granted summary judgment for defendant, from which Dang appeals. We affirm.

Factual Setting

In 2005, Dang obtained a loan in the amount of $448,000, the proceeds of which were provided to her by Countrywide Home Loans (Countrywide). The loan was secured by a deed of trust on real property located at 2507 11th Avenue, Oakland (the Property). The deed of trust contains these entries under items C, D, and E: "(C). 'Lender' is AMERICA'S WHOLESALE LENDER. Lender is a CORPORATION organized and

existing under the laws of New York. Lender's address is P.O. Box 10219, Van Nuys, CA 91410-0219." "D" defines "Trustee" as "RECON TRUST COMPANY, N.A." And "E" describes the beneficiary: "(E) 'MERS' is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. **MERS is the beneficiary under this Security Instrument."**

Since the reference to "America's Wholesale Lender" (sometimes referred to by the parties and the court as "AWL") is the central issue here, we note that this was the fictitious name, and mark, under which Countrywide conducted part of its mortgage lending business, a name and mark it had registered in 1995 and used in California and throughout the United States. And as particularly apt here, in March 2001 Countrywide registered "America's Wholesale Lender" as a fictitious business name under which it operated in Alameda County.

Finally, there is no question that business can be transacted under a fictitious business name. (See generally Bus. and Prof. Code §§ 17900 et seq.)

Adverting back to the documents here, the deed of trust expressly provides on its face that after recording it shall be returned to Countrywide. Dang signed the deed of trust, and it was in fact recorded on July 6, 2005.

Dang stopped paying on the note in late 2010, and has been in default since that time. And as of March 20, 2017, the payoff for the loan was $644,664.

Meanwhile, in March 2012, an Assignment of Deed of Trust was recorded, in which MERS transferred the beneficial interest under the deed of trust to " 'The Bank of New York, as Trustee and the Bank of New York Trust Company, N.A., co-trustee under the Pooling and Servicing Agreement Dated as of August 1, 2005 Asset-Backed Certificates, Series 2005-8.' "

Then, in September 2015, a corrective Corporate Assignment of Deed of Trust (DOT) was recorded, in which MERS corrected the assignee in the earlier assignment to The Bank of New York Mellon fka Bank of New York as Trustee for the Certificateholders of the CWABS, Inc., Asset-Backed Certificates, Series 2005-8.

The Proceedings Below

On February 25, 2015, Dang filed a complaint alleging two causes of action, for (1) quiet title and (2) declaratory relief. The complaint named three defendants: (1) "America's Wholesale Lender, A New York Corporation;" (2) "Bank of New York, as Trustee;" and (3) "The Bank of New York Trust Company, N.A., as Co-Trustee; the Asset-Backed Certificates, Series 2005-8." The complaint was unusual in several respects, including its first page, which described the declaratory relief action as seeking "(Judicial Determination that the 'Deed of Trust' and any 'Assignments of Deeds of Trusts' are void Instruments)," and also noting that "no Foreclosure Trustee Sale has transpired."

As Dang describes in her brief, the complaint is based on the fact that "AWL was a non-existing entity having no record of incorporation and that the grant deed was a cloud on Appellant's title to the Property. (*Id*.) Furthermore, as a non-existing entity, Appellant claimed that the deed of trust AWL held was void and that any and all subsequent transfers, including a transfer to The Bank of New York Mellon, were also void. (*Id*.) As a result, Appellant sought to quiet title to the Property."

In this regard, the second page of Dang's complaint has what she describes as an "Introductory Pleading Point and Authorities, Summary" that described her claim. It reads as follows: "Although named in this complaint as the first Defendant 'America's Wholesale Lender, a New York Corporation' (AWL) is a non-existent entity.

"As a stated Entity or Lender it has never existed, nor does it currently exist, however problematic, is the fact that this entity is specifically stated, as such, on a recorded Title Instrument (the **Deed of Trust** at issue and challenged herein) which currently exists as a Cloud on Plaintiff's Real Property Title. Unequivocally this recorded Instrument is a **'void'** document or instrument, and the legal significance or effect of such is the essence of Plaintiff's action. If found to be **'void'** then Plaintiff would be entitled to Judgment of Quiet title.

"The Case of 'Bank of N.A., et al., v. Nash' [*sic*] recently decided in the State of Florida (copy of the final Judgment attached as Attachment '1' herein) clearly provides

an in-depth factual finding and unequivocal legal ruling that 'AWL' did not exist nor does it currently exist. Additionally; that the relative recorded Title Instrument (the Mortgage in that case since Florida is a Mortgage and not a Deed of Trust state unlike California) was void and any purported assignment was likewise void or invalid. Therefore; if any assignee or successor in interest claimed to hold an interest as against Plaintiff's property their purported interests would also be void and invalid.

"Plaintiff's initial claim herein challenges the very Title Instrument (the **Deed of Trust**) in the name of 'AWL' which exist as a Cloud on Title recorded against their property which would clearly also be factually and legally **'void'** and thus the basis of a Declaratory determination of such and a Judgment for Quiet title.

"Furthermore any purported assignment or transfer of subject **'void'** Deed of Trust would likewise be deemed **'void'** as to any successor in interest or assignee."

To complete its unusualness, the complaint had appended to it a copy of the *Nash* case referred to in the introduction.[1]

The Bank of New York Mellon, formerly known as Bank of New York (for consistency with the proceedings below, hereafter referred to as BONYM) filed an answer. Then, in April 2017, BONYM filed a motion for summary judgment. In addition to a memorandum of points and authorities, the motion was accompanied by two declarations, of Cheryl Ratke, a representative of the attorney in fact for BONYM, and Allen Bareng, an associate of BONYM's counsel of record, both of which declarations authenticated various documents. The motion was also accompanied by a request for judicial notice, seeking judicial notice of five documents, three of which had been

[1] We have been unable to determine the final outcome of the *Nash* case. What we have been able to determine, however, is that a December 5, 2018 order from the United States District Court denying Nash an injunction, noted that the "state court judge entered a final judgment in the foreclosure action against Nash on October 18, 2017 and Nash's appeal is currently pending before the Florida appellate court. (*Id*. at 4-6)." We take judicial notice of the order in *Nash v. Bank of America* (M.D. Fla. Dec. 5, 2018, 6:18-cv-1712-Orl-37TBS) 2018 WL 6334136.

recorded in the Alameda County Recorder's office, and of which the trial court took judicial notice.

Dang filed opposition, which included a declaration of Dang's attorney Al West. West's declaration was four paragraphs, the first of which was Dang's claimed foundation; the second paragraph said that the "Deed of Trust solely names America's Wholesale Lender, a California corporation as the lender, and no dba is stated"; and the third and fourth paragraphs purport to testify that two signatures on the instrument are "forged," despite their being no foundation for West to testify on this subject. Dang's opposition also included "Objections to Defendant's [Request] for Judicial Notice."

The essence of Dang's opposition was that a "triable issue of fact exists as to whether the purported original lender ever existed and could convey title." Put otherwise, "As a non-existent entity, America's Wholesale Lender . . . could not assign the Deed of Trust to Defendant."

The motion was set for hearing on June 20, 2018, prior to which the court had issued a comprehensive, five page single-spaced tentative ruling granting the motion. Dang contested the ruling, and the motion was argued, though no reporter's transcript is in the record here. Following that argument, the court granted the motion and thereafter entered a judgment of dismissal, from which Dang appealed.

DISCUSSION

Summary Judgment and the Standard of Review

We set forth the applicable law in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 253: "Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code of Civ. Proc., § 437c, subd. (c).) As applicable here, moving defendants can meet their burden by demonstrating that 'a cause of action has no merit,' which they can do by showing that '[o]ne or more elements of the cause of action cannot be separately established . . . .' (§ 437c, subd. (o)(1); see also, *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479,

486–487.) Once defendants meet this burden, the burden shifts to plaintiff to show the existence of a triable issue of material fact. (§ 437c, subd. (p)(2).)

"On appeal '[w]e review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. [Citations.]' (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) Put another way, we exercise our independent judgment, and decide whether undisputed facts have been established that negate plaintiff's claims. (*Romano v. Rockwell Internat., Inc., supra,* 14 Cal.4th at p. 487.) As we put it in *Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 320, '[W]e exercise an independent review to determine if the defendant moving for summary judgment met its burden of establishing a complete defense or of negating each of the plaintiff's theories and establishing that the action was without merit.' (Accord, *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972.)"

Such de novo review leads easily to the conclusion that the trial court was right.

The Complaint Has No Merit

Dang has filed a 12-page brief that has one argument, set forth in two and a half pages, which argument has two subparts, that: (1) BONYM did not meet its burden on summary judgment; and (2) even if it did, Dang "submitted sufficient evidence indicating triable issues of material fact." Dang is wrong on both counts.

The essence of Dang's complaint is that she is the owner of the property; that the deed of trust named "America's Wholesale Lender"; that such an entity did not legally exist; and that any assignment of the deed of trust was void because the deed of trust itself was void. And so, she seeks a judicial determination that "title to [the Property] is singularly solely held by Plaintiff(s) alone and that Defendants and each of them be declared to have no such interests either Legal or Equitable" in the Property.

Against that complaint, BONYM introduced evidence that America's Wholesale Lender was a "dba" of Countrywide Home Loans, Inc., a valid New York corporation; that Countrywide registered the fictitious business name "America's Wholesale Lender"

as a trademark and used it in California and through the United States, including registering that fictitious business name in Alameda County in March 2001. BONYM also introduced evidence that Dang applied for a loan from Countrywide and admits she received a $448,000 loan to purchase the Property from Countrywide doing business as AWL. BONYM also demonstrated that Dang signed the DOT, initialed all the pages, and confirmed her signature on it; and that the DOT states on its face that, after recording, it is to be returned to Countrywide, at the same address listed as the address of the "Lender."

This met BONYM's burden—and Dang has submitted nothing contrary raising a triable issue of fact.

BONYM cites five cases that have rejected claims identical to that asserted by Dang here, its brief reading as follows: "Courts throughout the country have recognized that AWL is [Countrywide's] assumed business name. *Tyshkevich v. Wells Fargo Bank, N.A.*, 2016 WL 193666, * 9 (E.D. Cal. Jan. 15, 2016) (California law provides that AWL can work as a fictitious business name for [Countrywide]); *Perry v. Select Portfolio Servicing*, 2016 WL 3078839, * 1 (N.D. Cal. Jan. 8, 2016) (There is no dispute that America's Wholesale Lender was a trade name used by Countrywide Home Loans, Inc.); *Dawson v. Bank of New York Mellon*, 2016 WL 721626, *3 (D. Ore. Dec. 13, 2016) (same); *Bashore v. Bank of Am.*, 2012 WL 629060, *3 (E.D. Tex. Feb. 27, 2012) (holding Countrywide filed an assumed name certificate for AWL three years before Plaintiff signed the mortgage documents); and *Roberts v. Am's Wholesale Lender*, 2012 WL 1379203, *3-4 (D. Utah Mar. 22, 2012) (recognizing that AWL is Countrywide's trade name)."

Dang's reply brief does not even mention these cases, much less respond to them. And we find the cases persuasive—indeed dispositive.

Dawson v. Bank of New York Mellon (D. Or. Dec. 13, 2016, 3:16-cv-01427-HZ) 2016 WL 7217626 (*Dawson*) the most recent of the cases, discussing several of the others, is illustrative. *Dawson* involved a motion to dismiss. Plaintiff's opposition made

two arguments in support of his declaratory relief claim, one of which was that "AWL was not a valid legal entity." The court rejected the claim, observing as follows:

"AWL was and continues to be a valid legal entity. Plaintiff argues that the DOT is void because AWL was a non-existent entity and not the true lender. . . . [T]he Court previously took judicial notice of three documents . . . [that] demonstrate that AWL is an assumed business name of Countrywide and that AWL has been registered with the Oregon Secretary of State since 1995 . . . .

"Indeed, other courts have considered the same question and concluded that the fact that AWL is Countrywide's assumed business name cannot be disputed. *Tyshkevich v. Wells Fargo Bank, N.A.*, [*supra*], 2016 WL 193666, at *10 (E.D. Cal. Jan. 15, 2016) (recognizing that AWL is a fictitious business name for Countrywide), . . . ; *Bashore v. Bank of Am.*, [*supra*], (E.D. Tex. Feb. 27, 2012) (holding that Countrywide 'filed an assumed name certificate for [AWL] three years before Plaintiff signed the mortgage documents here. The Court finds that such filing was sufficient under Texas law') (internal citation omitted), . . . ; *Roberts v. Am.'s Wholesale Lender*, [*supra*], 2012 WL 1379203, at *3–4 (D. Utah Mar. 22, 2012) (also recognizing that AWL is Countrywide's trade name and rejecting plaintiff's conclusory allegations to the contrary) . . . .

"The Court fails to see how Plaintiff can plausibly allege that AWL 'never existed' while simultaneously borrowing money from it. Pl. Resp. 5; Compl. ¶ 6. When analyzing the same argument, a Texas trial court stated that the plaintiff did not deny 'that this "non-existent" lender advanced him $119,000 to help purchase the real property that is the subject of the mortgage. Moreover, Plaintiff admits that he owes the debt.' *Sparks v. The Bank of New York Mellon*, No. H-14-813, 2015 WL 4093944, at *3 (S.D. Tex. July 7, 2015). Here too, Plaintiff does not deny that AWL advanced her $288,000 to purchase her property. Compl. ¶ 6. Nor does she deny that she owes the debt. Id. at ¶¶ 6–25. Plaintiff's allegation that AWL was not a valid legal entity fails to support a plausible claim and [Bank of America, N. A.'s] motion to dismiss Claim I as to AWL is granted. Compl. ¶ 28.E." (*Dawson*, *supra*, at pp. *2–*3.)

All that, of course, is expressly applicable here, under California law as well.

Perry v. Select Portfolio Servicing, Inc., et al.,(N.D. Cal. Jan. 08, 2016, 15-cv-03629-RS) 2016 WL 3078839, a case from the Northern District of California, also involved a motion to dismiss, this as to Perry's amended complaint. The motion was granted, in language applicable here: "While the motion to dismiss was therefore granted, Perry was given leave to amend. She was cautioned to focus on any factual allegations that might take this case outside those challenges to the securitization process and document signing procedures that routinely are subject to dismissal. Consistent with that direction, Perry now places additional emphasis on her contention that the underlying promissory note and deed of trust are void because they were executed in the name of 'America's Wholesale Lender,' which she contends 'was not a legal entity capable of entering into a contract.'

"There is no dispute, however, that as the Second Amended Complaint expressly alleges, 'America's Wholesale Lender' was a trade name used by Countrywide Home Loans, Inc. Perry further expressly acknowledges that she in fact received a $536,000 loan pursuant to the note and deed of trust. Perry has advanced no viable basis for finding the note and deed of trust void simply because the lender was identified by its trade name instead of its formal legal name. [Fn. omitted.]" (*Perry v. Select Portfolio Servicing*, *supra*, 2016 WL 3078839, at p. *1.)

Dang also claims that the trial court determined an issue of fact in its reading of the deed of trust, where the trial court observed as follows: "The court takes judicial notice that the lender listed in the recorded DOT was not 'America's Wholesale Lender, a New York Corporation,' as alleged in the complaint. (Request for Judicial Notice [RJN], Exh. C, p. 2.) Instead, the DOT states: ' "Lender" is [¶] AMERICA'S WHOLESALE LENDER [¶] Lender is a CORPORATION [¶] organized and existing under the laws of NEW YORK. [¶] Lender's address is [¶] P.O. Box 10219, Van Nuys, CA 91410-0219.' (Id.) In other words, though the DOT states that the lender is a New York corporation, and that it was 'America's Wholesale Lender,' it does not expressly state that there was a New York corporation registered under that specific name. Instead, the wording is consistent with BONYM's evidence that the lender was [Countrywide], which was both

an existing New York corporation and an entity known as 'America's Wholesale Lender.' (UMF 1-10 and evidence cited.)"

But just as the trial court noted—accurately, we might add—a recent case from the Eastern District of California rejected the identical argument. That case is *Tyshkevich v. Wells Fargo Bank, N.A.* (E.D. Cal. Jan. 15, 2016) 2016 WL 193666, where the court observed as follows: "At oral argument on this matter, however, plaintiff pressed the possibility that AWL was actually non-existent, rather than simply a fictional name, by asserting that the Deeds of Trust identify AWL as a New York corporation, when in fact, she alleges, it was not a New York corporation. This argument misreads the Deeds of Trust. They do not state that 'AWL' is a corporation. Rather, they state that the 'Lender' is a corporation organized under the laws of New York. While the wording could be clearer, this plain meaning of this is that the 'Lender' – which plaintiff implicitly acknowledges is Countrywide (dba AWL) – is a New York Corporation. It does not assert that AWL – the fictitious name itself – is a New York Corporation." (*Id*. at p. *9.)

We close with the observation that Dang in fact received $448,000. There was nothing void about that. She received real money, and now is attempting to justify not paying anything back because of the language in the deed of trust—language, we hasten to point out, Dang misreads. It will not be allowed. Not under the law. And not under the maxims of jurisprudence. As one such maxim mandates, "[a]n interpretation which gives effect is preferred to one which makes void." (Civ. Code, § 3541.) And as another states, "[t]he law respects form less than substance." (Civ. Code, § 3528.)

DISPOSITION

The judgment is affirmed. Defendant shall recover its costs on appeal.

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Richman, Acting P.J.

We concur:

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Stewart, J.

_____
Miller, J.

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